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93-1000

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC.,
Petitioners,

v.

MARK JACKSON and LAURIE JACKSON,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, makes an agreement to arbitrate enforceable, as a matter of federal law, provided that it is part of "a contract evidencing a transaction involving commerce." The question presented here is as follows:

Whether the Alabama Supreme Court correctly held—contrary to the view taken by most state and federal courts—that Section 2 is inapplicable to contracts otherwise involving interstate commerce if the parties did not "contemplate[] substantial interstate activity" at the time of the contract.

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Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not yet reported. It is reprinted in the appendix to this petition at 1a-4a. The order of the circuit court is not reported. It is reprinted in the appendix to this petition at 5a-8a.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on August 13, 1993. A timely petition for rehearing was denied on September 24, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> **Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides in relevant part:

> **"Maritime transactions" and "commerce" defined; exceptions to operation of title**
>
> . . . "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

STATEMENT

This petition is being filed simultaneously with a companion petition, captioned *Allied-Bruce Terminix Cos. v. Dobson*, arising from another decision of the Supreme Court of Alabama on the same issue entered on the same

day.[1] In both cases, petitioners seek review of that court's construction of the Federal Arbitration Act (the "FAA" or "the Act"). Section 2 of the Act requires enforcement of arbitration agreements in any "contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and Section 1, in turn, defines commerce to include "commerce among the several States," 9 U.S.C. § 1. In this case, as in *Dobson*, the Supreme Court of Alabama held that the FAA did not apply to a contract containing an arbitration agreement because, notwithstanding the contract's actual nexus with interstate commerce, the parties had not "*contemplated* . . . substantial interstate activity." Pet. App. 4a (citing *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961)) (Lumbard, J., concurring) (emphasis added).

This case arises out of a home termite protection agreement between Tommie and Kelley Geohagan and petitioners Allied-Bruce Terminix Companies, Inc. ("Terminix Service") and Terminix International Company ("Terminix International"). Terminix Service is an Arkansas corporation with offices in Florida, Georgia, Mississippi, Louisiana, Arkansas, Oklahoma, and Texas, as well as in Alabama. Terminix International is a limited partnership with its principal place of business in Memphis, Tennessee. The termite protection plan provided for services to be performed by Terminix Service. Terminix International, in turn, guaranteed the terms of the plan. The contract embodying the plan expressly provided that "any controversy or claim between [the parties] arising out of or relating to the interpretation, performance or

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[1] **The caption reflects all of the parties in the court below. There are two additional individual defendants who did not participate in this appeal—George Massey and George Battle. The only corporate petitioner in this case—Allied-Bruce Terminix Cos.—has no parent company or subsidiaries.**

breach of any provision of this agreement *shall be settled exclusively by arbitration.*" C.R. 36 (emphasis added).[2]

The termite protection plan was subsequently transferred to respondents as part of their agreement to purchase the Geohagans' home. At that time, the Geohagans also presented respondents with a form prepared by one of the petitioners indicating that the home had recently been inspected and that termite damage had been discovered. C.R. 7. An attached graph specifically described the nature and extent of the damage. C.R. 8.

Respondents allege that they later discovered more substantial termite damage to their house than was reflected in the graph. In 1991, they brought an action against petitioners, alleging fraud, misrepresentation, negligence, and breach of contract. Petitioners moved to compel arbitration of the contractual claim pursuant to the arbitration clause in the contract. The trial court denied this motion, concluding that the termite protection "agreement does not have a sufficient nexus with interstate commerce activity to bring it within the coverage of the FAA." Pet. App. 6a.[3]

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[2] "C.R." refers to the certified record in the court below. The full text of the arbitration provision is as follows:

> The Purchaser and Terminix agree that any controversy of claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

[3] The trial court also held, in the alternative, that petitioners had waived their right to arbitration by proceeding with discovery in the case for a number of months before filing a motion to compel arbitration. (*See* Pet. App. 6a-7a.) Because of its ruling on the interstate commerce issue, the Alabama Supreme Court did not address the other issues raised by petitioners' appeal. Those issues would remain open for consideration on remand if this Court were

The Supreme Court of Alabama affirmed, relying on state law for the proposition that "[p]redispute arbitration clauses" are not enforceable. *Id.* at 2a. The court acknowledged that Section 2 of the FAA, where applicable, supersedes state law and requires enforcement of arbitration agreements as a matter of federal law, *ibid.*, but it held that Section 2 did not apply to this case because the required nexus with interstate commerce did not exist. It refused to apply a test asking whether there is a "slight nexus" with interstate commerce. *Id.* at 4a. Instead, in the court's view, the determinative question was "whether the parties to the contract contemplated, at the time they entered into the contract, substantial interstate activity." *Ibid.* (citing *Metro Industrial*, 287 U.S. at 387 (Lumbard, J., concurring)). Applying that test, the court concluded that "the FAA does not apply because there is no evidence that the Jacksons, when they entered into the termite bond, thought that it would involve substantial interstate activity." *Ibid.* Moreover, in the court's view, the "performance did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract." *Ibid.* (citing the court's opinion in the companion *Dobson* case, issued on the same day).

REASONS FOR GRANTING THE WRIT

This case warrants the attention of this Court for all of the reasons set forth in the *Dobson* petition, which is incorporated here by reference. As petitioners argued there, the lower courts need further guidance concerning the proper approach to determining whether a given contract is covered by the FAA. In the absence of such guidance, identical arbitration agreements in identical contracts will continue to be enforceable in some jurisdictions and unenforceable in others, depending on how the Act is interpreted. Moreover, the particular approach adopted

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to reverse the ruling of the Alabama Supreme Court with respect to the applicability of the FAA to this contract.

by the Alabama Supreme Court is plainly wrong. There is no basis in the language or policies of the Act for refusing to apply it to a case where the parties affirmatively agreed to arbitrate disputes and where the transaction in fact involved interstate commerce, simply because a court finds that the parties did not subjectively "contemplate" the interstate nature of the transaction.

Accordingly, petitioners ask that the Court grant review in this case and consolidate it with the *Dobson* case for briefing and argument. In the alternative, the Court may wish to grant review in one of the cases and hold the other petition pending a ruling on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 22, 1993

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APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1993

1911842

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC., a corporation

v.

MARK JACKSON and LAURIE JACKSON

Appeal from Montgomery Circuit Court
(CV-91-1874)

ALMON, JUSTICE.

The defendants, Terminix International Company Limited Partnership ("Terminix International") and Allied Bruce Terminix Companies ("Terminix Service"), appeal from the trial court's order denying their motion to compel the plaintiffs, Mark and Laurie Jackson, to arbitrate the claims stated in certain counts in an action filed by the Jacksons. A single issue is presented: whether the contract between the parties—a termite bond—contains sufficient contacts with interstate commerce to bring it within the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

In March 1988, Mark and Laurie Jackson agreed to purchase a house in Montgomery, Alabama, from Tommy Geohagan. At the closing, Geohagan showed the Jacksons a Veterans' Administration ("V.A.") form that had been prepared by Terminix Service. This form indi-

cated that Terminix Service had inspected the house and had observed existing termite damage; a graph attached to the form specifically described the nature and extent of the damage. At the same time, Geohagan assigned to the Jacksons his rights in a termite bond that he had previously acquired from Terminix Service and Terminix International.[1] This bond contained a clause providing that any dispute arising out of or relating to the bond would be settled by arbitration.

The Jacksons later discovered substantial termite damage to their house. They brought an action against Terminix Service and Terminix International, alleging that the defendants had defrauded them by misrepresenting the nature of the termite damage referenced on the V.A. form; the complaint also included a breach of contract count. Terminix Service and Terminix International subsequently moved to compel the Jacksons to arbitrate the breach of contract claim pursuant to the arbitration clause in the termite bond. The trial court denied the motion, and Terminix International and Terminix Service appeal from that order.[2]

Predispute arbitration clauses are not specifically enforceable in Alabama. Ala. Code 1975, § 8-1-41. However, if an arbitration clause is contained in a contract that involves interstate commerce, then the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, preempts state law. Under the FAA, arbitration clauses are specifically enforceable. *Ex parte Costa & Head (Atrium), Ltd.*, 486

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[1] Terminix Service was responsible for rendering the services on the bond; Terminix International was the guarantor on the bond.

[2] Although the trial court's order is not technically a final order, this court has decided, in light of the 1988 amendments to the FAA, which provide for an immediate appeal of a ruling on a motion to compel arbitration, to treat such orders as final for purposes of appeal. *Ex parte Brice Building Co.*, 607 Ala. 132 (Ala. 1992); *A.G. Edwards & Sons v. Clark*, 558 So. 2d 358, 360 (Ala. 1990).

So. 2d 1272 (Ala. 1986); *Ex parte Shamrock Food Service, Inc.*, 514 So. 2d 921 (Ala. 1987).

Terminix International and Terminix Service argue that the termite bond need only have the slightest nexus with interstate commerce for the FAA to apply. They cite *Costa & Head, Maxus v. Sciacca*, 598 So. 2d 1376 (Ala. 1992), and *Ex parte Brice Building Co.*, 607 So. 2d 1321 (Ala. 1992), to support this proposition.[3] Terminix International and Terminix Service argue that the termite bond does have at least a slight nexus with interstate commerce, for the following reasons: Terminix International has no office in Alabama, but is a Delaware limited partnership with its principal office in Memphis, Tennessee; Terminix Service is an Arkansas corporation; and the bond, because it obligates both companies to retreat the home and repair any damage that results from the infestation of termites, contemplates that at least some of the products used to perform these services will be obtained from out-of-state sources.

The Jacksons respond with the argument that the cases cited by the appellants concern construction contracts, which almost inevitably affect interstate commerce because of the presence of out-of-state suppliers and subcontractors. They argue that the narrower standard enunciated in *Ex parte Warren*, 548 So. 2d 157 (Ala. 1989), cert. denied, 493 U.S. 998, 110 S.Ct. 554, 107 L.Ed.2d 550 (1989), should control this case.[4] In *Warren*, this

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[3] This Court recently overruled the cases applying the *Costa & Head* standard to the extent that they utilized the "slightest nexus" standard to determine the enforceability of arbitration agreements. *Ex parte Jones*, [Ms. 1920249, July 16, 1993] —— So. 2d —— (Ala. 1993); *Continental Grain Co. v. Beasley*, [Ms. 1920241, July 16, 1993] —— So. 2d —— (Ala. 1993).

[4] In *Ex parte Jones* and *Continental Grain*, *supra* fn. 3, this Court exclusively adopted the *Warren* standard for analyzing whether contracts have a sufficient involvement with interstate commerce to invoke the FAA.

Court held that in the context of a sale of consumer goods that occurred wholly within the state, the test was not whether the contract had a slight nexus with interstate commerce, but whether the parties to the contract contemplated, at the time they entered into the contract, substantial interstate activity. See *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817, 82 S.Ct. 31, 7 L.Ed.2d 24 (1961). See also *Ex parte Williams*, 555 So. 2d 146 (Ala. 1989); *Burke County Public Schools Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816, 822 (1981). The Jacksons assert that they believed the termite bond was a local contract when they entered into it, and that therefore the arbitration clause has no effect. The Jacksons alternatively argue that the contract does not have a slight nexus with interstate commerce even under the broader test.

This Court holds that the termite bond does not involve interstate commerce under the *Warren* standard. Under the *Warren* test, the FAA does not apply because there is no evidence that the Jacksons, when they entered into the termite bond, thought that it would involve substantial interstate activity. The performance did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract. See *Allied-Bruce Terminix Cos. v. Dobson*, [Ms. 1920473, August 13, 1993] —— So. 2d —— (Ala. 1993).

For the foregoing reasons, the trial court properly denied defendants' motion to compel arbitration of the breach of contract claim.

AFFIRMED.

Houston, Steagall, and Ingram, JJ., concur.

Kennedy, J., concurs in the result.

APPENDIX B

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

CV-91-1874-TH

MARK JACKSON and LAURIE JACKSON,
Plaintiffs,

vs.

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, *et al.*,
Defendants.

ORDER

This matter came to be heard upon the defendant's Motion to Compel Arbitration and to Stay Litigation Pending Arbitration and the plaintiffs' response to the same. The Court scheduled a hearing on said motion for May 4, 1992. Appearing for the plaintiffs' was the Honorable Ronald W. Wise and for the defendants, the Honorable Dorothy Littleton. Subsequent to the hearing the defendants submitted a Supplemental Brief in Support of Motion To Compel Arbitration and To Stay Litigation Pending Arbitration and the plaintiffs responded to the same.

Based upon the pleadings and the affidavit submitted by the plaintiff, the Court is of the opinion that the defendant's Motion to Compel Arbitration and to Stay Litigation Pending Arbitration should be denied. Based upon the pleadings and statements by counsel, the Court finds that the defendants are qualified to do business in Alabama and that the individual defendant is a resident of

Montgomery, Alabama. Terminix Service has an office in Montgomery, Alabama, and performs termite treatment and issues termite letters and protection plans to residents in the Montgomery area. The Terminix International Company, a limited partnership, is a Delaware limited partnership with its principal offices in Memphis, Tennessee. Terminix International guaranteed performance of the termite protection plan on plaintiffs' residence issued by Terminix Service. The plaintiffs had a termite letter and assumed a termite bond from a previous owner for his new residence in Montgomery, Alabama. The pleadings show that the Termite Protection Plan states that "Terminix will provide repairs to the home upon the discovery of new damage." At the bottom left hand corner of the Termite Protection Plan it states "Terminix Service, P.O. Box 7028, Montgomery, Alabama 36107, 205-265-0233." Any work that was to be performed by any of the defendants under the breach of contract claim would definitely be performed in the State of Alabama on a residence located in Montgomery, Alabama. The court finds that the agreement does not have a sufficient nexus with interstate commerce activity to bring it within the coverage of the FAA. *A. J. Taft Coal Company, Inc., v. Sam Randolph, et al,* Case No. 1910413 (July 31, 1992). This is true even if one assumes that it was Terminix International, Inc., as opposed to Allied Bruce Terminix Companies, Inc. (Terminix Service), who assumed said responsibility. It appears as if a jury could easily find that said guarantee on the breach of contract claim for the repair was guaranteed by Terminix Service based upon the "termite protection plan." This is due to the language on said "termite protection plan."

Further, the Court finds that even if the arbitration clause was enforceable as to that one cause of action with that one defendant, the defendants have waived any right to arbitration which they may have had. The Court makes this finding based upon the totality of the cir-

cumstances in that the defendants have acted inconsistently with the arbitration right and, as a result, have prejudiced the plaintiffs. The Complaint in this case was served in August, 1991, and the defendants did not file their Motion to Compel Arbitration and Stay Litigation until March 30, 1992, some seven months later. During this period of time the defendants filed Requests for Admissions, Interrogatories, Request for Production of Documents and took two depositions totaling over 100 pages. Further, the plaintiffs have taken three depositions consisting of over 300 pages. There is no question that the defendants have acted inconsistently with this arbitration right and the plaintiffs have incurred expenses by participating in the litigation process. *S&H Contractors, Inc., v. A. J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990).

Therefore, the Court finds that it is not clear that Terminix International Company solely guaranteed repair of the home if new termite damage was found. The "termite protection plan" also refers to "Terminix" and "Terminix Service." This is a jury question. Second, the court finds that this is but one cause of action contained in the Complaint and that the plaintiffs rely solely on the breach of contract claim in asking for arbitration. Third, the court finds that even if Terminix International, with its business located in Tennessee, is the only guarantor under the contract claim for the repair of the home, that does not in and of itself provide a sufficient nexus to bring it within the FAA. *See, J. A. Taft Coal Company, supra.* Fourth, the court finds that the defendants have waived any rights to arbitration they may have had under the agreement. Therefore, it is ORDERED, ADJUDGED AND DECREED that the defendants' Motion to Compel Arbitration and Stay Litigation Pending Arbitration is hereby DENIED based upon the evidence submitted and the pleadings in this case and testimony presented at oral argument.

DONE 17th day of August, 1992.

/s/ H. Randall Thomas
H. RANDALL THOMAS
Circuit Judge

Ronald W. Wise
Dorothy Littleton

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

SEPTEMBER 24, 1993

1911842

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED BRUCE-TERMINIX COMPANIES, INC., a corporation

v.

MARK JACKSON and LAURIE JACKSON

(Montgomery: CV-91-1874)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON, J.—Houston, Steagall, Kennedy and Ingram, JJ., concur.

(2)

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v.

MARK JACKSON and LAURIE JACKSON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama Supreme Court correctly held that Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to contracts, the performance of which does not involve interstate commerce to such a degree that a reasonable person must have "contemplated substantial interstate activity" at the time of the contract?

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No. 93-1000

In The

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October Term, 1993

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC.,

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Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Mark Jackson and Laurie Jackson hereby submit their Brief in Opposition to the Petition for a Writ of Certiorari to the Supreme Court of Alabama filed by Petitioners. For the reasons set forth herein, respondents urge the Court to deny the Petition for a Writ of Certiorari.

We note preliminarily that this petition is one of three that have been filed from several contemporaneous decisions of the Alabama Supreme Court involving the scope of the "involving commerce" language contained in section 2 of the Federal Arbitration Act, 9 U.S.C. § 2. *Home*

Buyers Warranty Corp. II v. Lopez, NO. 93-995; *Allied-Bruce Terminix Cos. v. Dobson*, No. 93-1001. Although this Brief in Opposition is being filed prior to the opposition briefs in the other two cases, we respectfully suggest that the Court schedule all three petitions for the same conference, given the similarity of issues. Indeed, the petition in this case merely incorporates by reference the substantive arguments for granting review which were made in the petition filed in *Allied-Bruce Terminix Cos. v. Dobson, supra*. And since the opposition briefs in the other two cases will be filed later this month, simultaneous consideration of all three petitions will not unduly delay consideration of this petition.

STATEMENT OF THE CASE

The salient facts in this case are as follows. In essence, when respondents, the Jacksons, bought a home in Montgomery, Alabama, they also acquired rights under a termite protection plan from the previous owners with their offices located in Montgomery, Alabama. (C.R. 1-3; 35). The purpose in the plan was to provide pest control services at the respondents' home in Montgomery Alabama. When the Jacksons discovered termite damage in their home was far more extensive than petitioners had previously represented, they filed a Complaint in the Montgomery County Circuit Court. (C.R. 1-6). Some seven months later the petitioners filed a Motion to Compel Arbitration and Stay Litigation. (C.R. 31-34). During said seven months the petitioners filed requests for admissions, interrogatories, requests for production of documents, and took two depositions totaling over 100

pages. The plaintiffs, during that period of time, deposed three individuals consisting of over 300 pages. (Cert. Pet. App. 7a). The trial court held that the pleadings and evidence before it did not indicate a "sufficient nexus" to bring it within the FAA. (Cert. Pet. App. 6a). It is to be noted that the petitioners did not present any evidence whatsoever evidencing interstate commerce in support of their Motion to Compel Arbitration or in the hearing held thereon.[1]

The Alabama Supreme Court affirmed, finding that the performance of the contract "did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity" when they entered into the same. (Cert. Pet. App. 4a).

Several factual assertions in the petition warrant a brief response. The petitioner states at page 3 of his Certiorari Petition that "the Supreme Court of Alabama held that the FAA did not apply to a contract containing an arbitration agreement because, notwithstanding the

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[1] As is stated by Petitioners at page 4 at f. 3, the trial court held in the alternative that petitioners had waived their right to arbitration based upon the "totality of the circumstances" in that they acted inconsistent with the arbitration right by waiting 7 months after the complaint was served before filing their Motion to Compel Arbitration and Stay Litigation. During said 7 months the certified record in the court below indicates that the petitioners filed Request for admissions, Interrogatories, Request for Production of Documents, as well as deposing two people. Further, during this period of time, the respondents took several depositions consisting of over 300 pages. *See, S&H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990).

contract's actual nexus with interstate commerce, the parties had not *'contemplated . . . substantial interstate activity.'* Pet. App. 4a (citing *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961)) (Lumbard, J., concurring) (emphasis added)." However, nowhere in the Opinion of the Supreme Court of Alabama is any language to the effect that the contract involved in this case had an "actual nexus with interstate commerce." In fact, there is no evidence of a nexus with interstate commerce contained in the certified record in the court below.

REASONS FOR DENYING THE WRIT

The petition should be denied because, contrary to the assertions made in the companion petition in *Allied-Bruce Terminix Cos. v. Dobson*, No. 93-1001, the decision below does not conflict with any decision of this Court, nor is there a conflict with the decisions of other State Supreme Courts or Federal Appeals courts.

I. THE ALABAMA SUPREME COURT DID NOT ERRONEOUSLY CONSTRUE THE "INVOLVING COMMERCE" ELEMENT CONTAINED IN § 2 OF THE FEDERAL ARBITRATION ACT

The petition asserts that the Alabama Supreme Court erroneously construed the "involving commerce" element contained in Section 2 of the Federal Arbitration Act, a requirement which must be met in order for the provisions of that Act to bind private parties to a contract. Petitioners' claim essentially reduces to a contention that

the decision below conflicts with this Court's ruling in *Perry v. Thomas*, 482 U.S. 483 (1987).

The petitioner basically argues that the FAA is a statute "that embodies Congress' intent to provide for the enforcement of Arbitration agreements within the full reach of the commerce clause." *Id.* at 490. Therefore, the petitioners argue that the contracts at issue here must therefore "involve commerce" within the meaning of the Act. However, this is a misreading of *Perry*.

Perry involved a stockbroker's dispute over commissions paid in connection with the sale of certain stocks with a national stock brokerage firm that employed him. The issue was whether or not the Act trumped or pre-empted a state law that required he be given a judicial forum to resolve that conflict. The issue in *Perry* was not whether commissions on stocks "involve commerce," but was whether the Act pre-empted a state law as to what matters were and were not subject to arbitration. It is difficult to see how one could dispute the fact that transactions involving the sales of stock on national stock exchanges are somehow not in commerce.

Therefore, the quoted statement in *Perry* about Congress regulating within the full ambit of its commerce clause powers refers to Congress' exercise of its power to resolve what issues are arbitrable. *Perry* certainly did not stand for the proposition that Congress had, in fact, decided to subject every transaction and therefore every contract to the Act. It merely decided that if a transaction was, in fact, governed by the Act, then inconsistent State law was pre-empted.

The issue presented here, unlike that in *Perry*, is whether there is evidence which would allow our court to decide the particular transaction "involves commerce", such that the requirements of the Act could be invoked to compel arbitration.

As this Court recognized in *Bernhardt v. Polygraphic Company*, 350 U.S. 198 (1956), not every contract or transaction "involves commerce, and is therefore subject to the Act." The contract involved in this case does not evidence a "transaction involving commerce" or "commerce among the several states." It involves a resident of the State of Alabama purchasing a home and obtaining a termite bond on said home issued by a company with its office located in Montgomery, Alabama.[2] (C.R. 35).

Further, the petitioner's argument that the Alabama Supreme Court has adopted a "subjective standard" in determining whether the FAA applied is incorrect. The trial court was not presented with any evidence whatsoever evidencing a "transaction involving commerce" or "commerce among the several states". Therefore, the Alabama Supreme Court used an "objective" standard of whether or not the performance of the contract involved interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the same (Cert. Pet. App. at 4a).

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[2] The specific language on the bond is: Terminix Service, P.O. Box 7028, Montgomery, AL 36107, 205-265-0233. (C.R. 35)

II. THE OPINION OF THE ALABAMA SUPREME COURT IS NOT IN CONFLICT WITH FEDERAL APPEALS COURTS

Petitioners also err in arguing that the decision below conflicts with various cases from federal appeals courts. This is not the case.

Basically there are two types of contracts where "commerce" has frequently been found: (1) construction contracts, where there are building materials and other items, as well as employees, moving in interstate commerce. *Pathman Constr. Co. v. Knox County Hosp. Ass'n*, 326 N.E.2d 844 (Ind. App. 1975); *Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (N.C. 1981); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); and, (2) personal service contracts where it is obvious that the individual would be performing some of the terms of said contract in interstate commerce. *Bennish v. North Carolina Dance Theater, Inc.*, 108 N.C. App. 42, 422 S.E.2d 335 (1992).

There is also a third category of cases cited by the petitioners which does not fall within the above two categories but clearly evidences "commerce". The case of *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985) involved a contract dispute between Illinois residents over property in Texas and *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986) involved a contract dispute over mining claims where the output of the mine plainly traveled in interstate commerce.

The Petitioners overstate and misstate the extent to which there is a conflict between federal cases on one side and state cases on the other. As a preliminary matter,

the petition mistakenly cites *Pathman Constr. Co., supra,* as a decision of the Indiana Supreme Court when in fact it is a ruling of the Indiana Court of Appeals. As to *Burke Co. Pub. Schools Bd. of Educ. v. Shaver Partnership, supra,* the North Carolina Supreme Court held that a contract for the construction of a school building between a multi-state architectural firm and local Indiana school boards contemplated substantial interstate activity so as to be governed by the FAA. In *Burke,* the Court was addressing whether or not "contemplation" could be found from the factual criteria of the case. In doing so, the Court stated:

> "We do not mean to suggest that where the contracting parties are merely located in different states or where other facts tending only to show diversity of citizenship are present, the contract must necessarily be found to contemplate substantial interstate activity so as to trigger the act's applicability. *Where, however, performance of the contract itself necessarily involved, so that the parties to the agreement must have contemplated substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act." Burke County Public Schools Board v. Shaver,* 279 S.E.2d at 822 (1981). (Emphasis added).

Although the wording of the various cited decisions by the petitioners may vary to an extent, the petitioners are overstating the existence of any conflict.

Petitioners err in characterizing the decision below as requiring an inquiry into subjective intent, when a fair reading suggests that the contested "contemplated" language employed by the Alabama Supreme Court is in fact closer to the objective standard used in cases such as

Pathman, supra, and *Burke County, supra.* The Alabama Supreme Court stated: "The performance did not involve interstate commerce to such a degree that a reasonable person must have contemplated substantial interstate activity when they entered into the contract." *See, Allied-Bruce Terminix Cos. v. Dobson,* [Ms. 1920473, August 13, 1993] ___ So.2d ___ (Ala. 1993).

Moreover, even if the case were to be judged by the formulation of which petitioners seem to prefer, the result reached by the Alabama Supreme Court is entirely correct. The result reached by the Alabama Supreme Court would be the same however one worded the formulation. The contract in question involved a contract between a homeowner and an exterminator located in Montgomery, Alabama, to protect the homeowner from termites in his home. No evidence was presented to the trial court indicating that the contract evidenced a "transaction involving commerce" and the Motion to Compel Arbitration would have been denied were one to have used a "slight nexus" test or the "relating to" commerce language test that appear in some decisions.

Unlike large construction contracts where it is obvious that building materials and labor would be moving in interstate commerce (e.g. *Pathman, supra,* or *Burke, supra*) or even personal service contracts which indicate that the performer will travel to several states (*Bennish, supra*), a homeowner would have no objective expectation that "interstate commerce" was involved in a complaint to a local exterminator about a termite problem in his or her home.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari to the Supreme Court of Alabama should be DENIED.

This the 8th day of February, 1994.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR - 4 1994
OFFICE OF THE CLERK

Nos. 93-1000 and 93-1001

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP and ALLIED-BRUCE TERMINIX COMPANIES, INC.,
Petitioners,
v.
MARK JACKSON and LAURIE JACKSON,
Respondents.

ALLIED-BRUCE TERMINIX COMPANIES, INC., and TERMINIX INTERNATIONAL COMPANY,
Petitioners,
v.
G. MICHAEL DOBSON, WANDA C. DOBSON, STEVEN GWIN and JAN GWIN,
Respondents.

On Petition for Writs of Certiorari to the Supreme Court of Alabama

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petitions in these cases made two principal points: that different courts have employed markedly different approaches in deciding whether Section 2 of the Federal Arbitration Act makes agreements to arbitrate enforceable as a matter of federal law; and that the court below—in aligning itself with courts that apply Section 2 only when the parties "contemplated substantial inter-

state activity" at the time of their agreement—had chosen a reading of Section 2 that is contrary to both its language and purpose. In their briefs in response, respondents do not seriously argue that Congress intended to make agreements to arbitrate enforceable only if the parties "contemplated substantial interstate activity": indeed, neither brief makes any effort to defend that standard by reference to the language of Section 2, or its underlying policies, at all. Rather, the briefs simply contend, in a number of related ways, that the conflict among state and federal courts on this issue should be treated as immaterial. These contentions are uniformly unpersuasive.

1. The Dobson respondents initially argue that the transaction at issue here would not fall within the terms of Section 2 under *any* test currently being applied by state and federal courts. Dobson Br. at 3-6. But respondents' own discussion proves just the opposite. Although the facts set out in their brief—showing an agreement among parties in different states and the use of materials shipped in interstate commerce—were held insufficient by the Alabama Supreme Court to demonstrate that the parties "contemplated substantial interstate activity" (Pet. App. 6a-7a), they plainly *do* demonstrate a sufficient nexus to interstate commerce under the test employed by most federal courts. The Tenth Circuit has held, for example, that "[t]he requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause," *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986), and it is beyond question that Congress would have the "power . . . under the Commerce Clause" to regulate transactions between parties in different states involving materials that move in interstate commerce. Thus, in this case as in many others, the choice regarding the test to be applied is dispositive with regard to whether an agreement to

arbitrate is or is not enforceable as a matter of federal law.[1]

2. The principal thrust of respondent Dobsons' brief, echoed in respondent Jacksons' brief, is that the Court need not be concerned about the different tests for applying Section 2 that are employed by different courts. Dobson Br. at 6-11; Jackson Br. at 6-9. In particular, the Dobson respondents argue that the courts adopting the contemplation-of-the-parties test "do so in an effort to *broaden* the construction of the term 'involving commerce' not narrow it." Dobson Br. at 8. This argument is faulty on a number of grounds.

To begin with, it is nonsensical to say that a test requiring contemplation of *substantial* interstate activity will subject more transactions to the reach of federal law than a test requiring only a slight nexus with interstate activity.[2] Indeed, the former test—articulated by Judge Lumbard in *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961) (concurring opinion)—grew out of Judge Lumbard's disagreement with the view, taken by

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[1] The Dobson respondents do not dispute that the transaction *in fact* involved materials shipped in interstate commerce; rather, they say that this interstate movement would not "necessarily" occur in every case. Dobson Br. at 5. But that is simply another way of saying that the parties would not necessarily "contemplate" that activity at the time of their agreement. Under the standard adopted by the court below, of course, the fact of interstate commerce is not enough to require application of Section 2. It *is* enough under the test applied by most other courts.

[2] It is possible that the parties might contemplate substantial interstate activity in a transaction that, for some reason, turns out not to involve any at all. But it seems highly doubtful that courts employing the contemplation-of-the-parties test would actually find Section 2 applicable in those circumstances and, if they did so, it would raise serious questions about the power of Congress to preempt state law with respect to transactions having no nexus in fact to interstate commerce.

the Second Circuit in a previous case, that "Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements." *See id.* at 386 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed pursuant to stipulation*, 364 U.S. 801 (1960)). Judge Lumbard was instead of the opinion that the federal courts "must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." 287 F.2d at 386. Given that approach, it is hardly surprising that the test not only requires that the parties actually contemplate interstate activity but that the interstate activity, in addition, be substantial.

It is also crystal clear that—even if some other court thought so—the *Alabama Supreme* Court does *not* think that the test is "broader" than the actual nexus test. Indeed, that court has flatly stated that it elected to apply the contemplation-of-the-parties test because it "better promotes our strong public policy *against* the use of predispute arbitration agreements." *Lopez v. Home Buyers Warranty Corp.*, 628 So. 2d 361, 363 n.2 (Ala. 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (Dec. 22, 1993) (No. 93-995) (emphasis added).[3] This declaration, not mentioned by respondents, shows two things: first, that the test does restrict the application of Section 2 and, second, that it may be deliberately employed for that purpose by courts hostile to federal policy.

In any event, the relevant issue ultimately is not whether one test is broader or narrower than the other, but whether the test used below properly reflects Congress' intent in

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[3] Since the petitions in these cases were filed, the Alabama Supreme Court has reaffirmed its commitment to the contemplation-of-the-parties test, again using it to deny enforcement of an agreement to arbitrate. *Ex Parte Lorance*, No. 1930140, 1994 Ala. LEXIS 62 (Sup. Ct. Feb. 11, 1994).

enacting Section 2. This Court has said that "the Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987). As we have set out in the petitions, *see, e.g.*, Dobson Pet. at 8-12, the contemplation-of-the-parties test finds no basis in either the language of Section 2 (which speaks objectively of "transaction[s] involving commerce") or in its purpose (to put arbitration contracts on the same footing as all other contracts). It thus imposes an unjustified limitation on the power of Congress to make arbitration agreements fully enforceable as a matter of federal law.

3. This Court has expressed an "unwilling[ness] to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (holding that Section 2 must be applied in state as well as federal courts). But, if state and federal courts are free to interpret Section 2 in light of their own preferences about the enforceability of arbitration agreements, the scope of federal law will necessarily depend "on the particular forum in which it is asserted." *Id.* Thus, whatever the correct standard may be, a lack of uniformity in the application of Section 2 is flatly inconsistent with Congress' efforts to "create a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). This Court should grant review to correct it.

CONCLUSION

The petitions for writs of certiorari should be granted.

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